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CHARLES ELMORE CROPL

NO. 293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

JOSEPH G. WENNING, *Petitioner*,

v.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO, JOHN C. WEIGLE, JOSEPH PLEIMAN, GEORGE FRONING, EMMA FRONING, LAWRENCE M. DAVIS, RALPH J. AHLERS, THE CENTURY INDEMNITY COMPANY OF HARTFORD, CONNECTICUT, AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF HARTFORD, CONNECTICUT, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio

BRIEF IN OPPOSITION FOR RESPONDENTS

Lawrence M. Davis, Former Sheriff of Mercer County, Ohio, Ralph J. Ahlers, Former Deputy Sheriff of Mercer County, Ohio, The Century Indemnity Company of Hartford, Connecticut, and the United States Fidelity and Guaranty Company of Baltimore, Maryland

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BRIEF IN OPPOSITION.

Opinions Below

No opinion was rendered by the Supreme Court of Ohio. Its decision (folio 137-8, R.) is reported in 153 Ohio State 583. The opinion of the Court of Appeals (folio 125-9, R.) of Ohio has not been published. The opinion of the Common Pleas Court of Ohio (folio 110-13, R.) has not been published.

Jurisdiction.

The judgment of the Supreme Court of the State of Ohio was entered on March 22, 1950. Petitioner's motion in the

Supreme Court of Ohio for an order to the Court of Appeals of Ohio to certify its record was overruled on March 22, 1950 (folio 137-8, R.) An order denying a rehearing was entered by the Supreme Court of the State of Ohio on April 12, 1950 (folio 140, R.). By an order entered in this proceeding on June 17, 1950, the time for the filing of a petition for certiorari was extended to and including September 8, 1950. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257(3).

Question Presented.

Whether (1) the action of the state court in foreclosing petitioner's property is subject to attack where that action was taken in the absence of any restraint by the Federal Court in bankruptcy proceedings instituted by petitioner which were ultimately dismissed and whether (2) the failure of petitioner to appeal from an order overruling a motion for the recall of a writ of assistance or possession in the proceeding in which his property was foreclosed is not *res judicata* of a collateral suit in the same court attacking the validity of the foreclosure.

Statutes Involved.

The pertinent provisions of the Bankruptcy Act and Ohio Statutes are set forth in the petition at pages 4-6.

Statement of the Case.

September 7th, 1934—Petition in foreclosure filed by The Peoples Bank Company, Coldwater, Ohio, holder of second mortgage, in case No. 12534 of Common Pleas Court of Mercer County, Ohio, against Joseph G. Wenning et al. The Federal Land Bank of Louisville, Kentucky, holder of first mortgage being one of the parties defendant. Ex. 1, folio 1, R.

January 26th, 1938—Judgment and decree of foreclosure to Federal Land Bank on answer and cross-petition, in same case, ORDERING FORECLOSURE—ORDERING SALE and ORDERING APPRAISEMENT. Ex. A, folio 101, R.

(No Federal case pending on this date, per pertinent proceedings listed on pages 24 and 25 of petitioner's brief, and admitted on page 40 of said brief.)

January 28th, 1938 to October 10th, 1938—The petitioner, Joseph G. Wenning, had a petition pending in Federal Court, during which time the sheriff appraised, advertised and sold farm, but Common Pleas Court of Mercer County did not approve or confirm, or make any order or decree with reference thereto.

October 10th, 1938—The Federal Court dismissed the petition of Joseph G. Wenning, as a farmer debtor, and ordered that all stay orders heretofore entered thereunder be set aside and held for naught. Ex. C, folio 104-5, R.

December 17th, 1938—The Court of Common Pleas of Mercer County, Ohio, confirmed the sale of said real estate to John C. Weigel, as a result of the sale held on March 12th, 1938, by the Sheriff. Ex. 22, 23, folio 82, 84, R.

(No Federal case pending on this date, per pertinent proceedings listed on pages 25 and 26 of petitioner's brief.)

December 29th, 1938—Order for writ of possession issued by Common Pleas Court. Ex. 1, folio 1, R. Ex. 24, folio 87, R.

January 20th, 1939—Motion of farmer debtor, Joseph G. Wenning, in Common Pleas Court of Mercer County, Ohio, to recall writ of possession, which alleged the Court's lack of jurisdiction in the cause. Ex. 1, folio 1, R.

ARGUMENT.

The substance of the brief and argument of the petitioner is, that the state courts of Ohio have decided a federal question in a way probably not in accord with applicable decisions of the United States Supreme Court.

The applicable decision referred to by the petitioner, is the case of *Kalb* v. *Feuerstein*, 308 U. S. 453, which progressed into the State Supreme Court of Wisconsin and came on appeal to this Court.

The *Kalb* v. *Feuerstein* case is distinguished from this case in the following pertinent particulars, to-wit: In the *Kalb* v. *Feuerstein* case, the state court of Wisconsin confirmed the foreclosure sale while the petition of the farmer debtor was pending under Sec. 75 (a) to (r) for composition or extension. In this case the Court of Common Pleas of Mercer County, Ohio, did not confirm the sale until Wenning's petition in the Federal Court had been dismissed and in which entry of dismissal, the Federal Court ordered that all stay orders heretofore entered thereunder were set aside and held for naught. Ex. C, folio 104-5, R.

When the Court of Common Pleas of Mercer County, Ohio, entered its judgment and decree of foreclosure to the Federal Land Bank of Louisville, Ky. (Ex. A, folio 101, R.) and ordered foreclosure, appraisement and sale in the same entry, Wenning did not have a case pending in Federal court as a farmer debtor or otherwise. This is the judgment rendered on January 26th, 1938, that resulted in the sale of Wenning's farm by the sheriff.

When the Court of Common Pleas of Mercer County, Ohio, confirmed the sale of said farm to John C. Wiegel (Ex. 22, 23, folio 82, 84, R.), Wenning did not have a case pending in Federal Court as a farmer debtor or otherwise. The sale was confirmed on December 17, 1938, and the Federal Court had dismissed Wenning on October 10, 1938.

At no time between January 26th, 1938 (decree of sale, foreclosure and appraisement date) and December 17, 1938, (confirmation of sale date) did the Court of Common Pleas of Mercer County, Ohio, make any orders or execute any entries with reference to this case. Any acts performed with reference to this case between said dates, were performed by ministerial agents of the court, the sheriff and the clerk.

In the case of *Union Joint Stock Land Bank of Detroit* v. *Byerly*, 310 U. S. 1, which was a case very much like the case at hand, the court said (p. 7): "The sale was, however, incomplete until confirmation by the court. Until confirmation it amounted to an unaccepted offer to pur-

chase. No sale was consummated while the bankruptcy proceeding was pending".

We quote from page 8 of the opinion of the Court in said case as follows:

> "The termination of the bankruptcy proceedings restored the jurisdiction and power of the state court . . . Although the state court's jurisdiction was superseded by that of the bankruptcy court, it again attached upon the dismissal of the bankruptcy case, and, thenceforward, as respects the foreclosure suit, and the state court's procedure, it was as if no bankruptcy case had ever existed."

After discussing the actions of the state court in the *Byerly* case, the Court in its opinion said (p. 10):

> "If it erred in that respect its action was subject to correction by appeal but not subject to attack in a collateral proceeding."

In this case, the decree of the Federal District Court, dismissing Wenning's petition and declaring void all stay orders issued thereunder, relieved the mortgagees of any disability to pursue their rights under the state law.

> " * * * orders and decrees by bankruptcy courts, if valid, relieved the respondents, as mortgagees, of any disability to pursue their foreclosure suits arising out of the pendency of the bankruptcy proceedings and left them free to prosecute the foreclosures in the state courts. However erroneous the challenged orders, the remedy of their correction was by timely appeal or application for review" *Bernards* v. *Johnson*, 314 U. S. 19, 32.

Therefore the sheriff's sale as conducted by L. M. Davis, one of the respondents herein, by order of the court made at a time when no federal cases were pending, was no more than a receipt of bids, while at the same time holding the debtor and his property in *status quo*. No injury or prejudice to Wenning resulted; nothing happened to

change the relation between Wenning and his property until the Federal Court dismissed his petition in bankruptcy and set aside and held naught all stay orders theretofore entered.

It is the contention of the petitioner that the Court of Common Pleas of Mercer County, Ohio did not have the jurisdiction or power, to make the orders with reference to the foreclosure on the Wenning farm. The same contention was made by Wenning when he filed a motion for recall of the writ of assistance or possession, on January 20th, 1939, in the Common Pleas Court of Mercer County, Ohio, in said foreclosure case (Ex. 1. folio 1, R. Appearance Docket Entries), which motion alleged the Court's lack of jurisdiction in the cause. This was a direct attack on the validity of the orders made and the jurisdiction of the Court to enter such orders.

Wenning, having failed to prosecute a timely appeal from the court's order overruling the motion, is bound thereby and is now estopped, under the principles of *res judicata*, to attack the validity of the proceedings had in such cause or to relitigate the matters determined therein.

> " * * * the principles of *res judicata* apply to questions of jurisdiction as well as to other issues".
>
> *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 403;
> see also *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66, rehearing denied, 309 U. S. 693.

Aside from the question of whether the sheriff, Davis, his deputy, Ahlers, and the former's surety have any liability for these acts performed in the official course of the sheriff's duty, it is patent from any point of view that the surety of the deputy sheriff, the United States Fidelity & Guaranty Company, could have no liability in this proceeding on a bond which runs only to the sheriff and is a private obligation in his favor.

Conclusion.

The writ should be denied because there is not involved a state court decision that is contradictory to a decision of this Court and the petitioner has not been deprived of his property without due process of law.

Respectfully submitted,

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September 29, 1950